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June 18, 2009

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, D.C. 20554

ATTENTION: Albert Lewis  
Chief, Competitive Pricing Division  
Wireline Competition Bureau

RE: May 12, 2009 Petition of Level 3 for a Declaratory Ruling Regarding Access  
Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls; WC  
Docket No. 01-92; CC Docket No. 96-262

Dear Ms. Dortch:

This letter discloses a permissible oral ex parte communication.

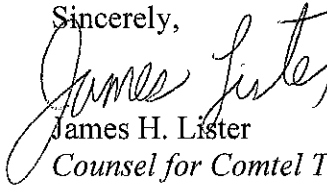
On June 17, 2009, the undersigned attorney for Comtel Telcom Assets LP d/b/a Excel Telecommunications ("Excel") spoke briefly by telephone with Al Lewis, Chief of the Competitive Pricing Division of the Wireline Competition Bureau, regarding the above-referenced matter.

During the conversation, the undersigned explained that Hypercube had told the Texas Federal Court in which litigation between Hypercube and Excel is pending that "the FCC declined Level 3's request to initiate a declaratory ruling proceeding . . . ."1 Mr. Lewis replied that Hypercube's statement was incorrect and that the FCC had made no decisions on Level 3's Petition. The undersigned also provided Mr. Lewis, by email, with a copy of the pleading filed with the Texas Federal Court in which Hypercube made that statement. A copy of the email and Hypercube's pleading is attached.

<sup>1</sup> Hypercube's Response to Excel's Notice to Related Cases at 2, (June 17, 2009, ECF Doc. No. 56), U.S. Dist. Ct. N.D. Texas, Case No. 3:08-cv-02298-B.

In the remainder of the brief conversation, the undersigned directed Mr. Lewis' attention to Excel's letter<sup>2</sup> filed in these dockets on June 15, 2009 regarding the Level 3 Petition.

Sincerely,



James H. Lister

*Counsel for Comtel Telcom Assets LP  
d/b/a Excel Telecommunications*

Cc: John T. Nakahata (Counsel for Level 3)  
Anthony Mastando (Counsel for DeltaCom)  
Michael Hazzard (Counsel for Hypercube)  
Bob Arnett (Co-Counsel for Excel Telecommunications)

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<sup>2</sup> On June 1, 2009, Excel filed Initial Reply Comments and a Motion to Extend the time in which final reply comments could be filed until June 15, 2009. Excel asked that its June 15, 2009 letter be treated as reply comments if the Motion is granted and a written ex parte presentation if it is denied.

# ATTACHMENT

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## Betty Wines

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**From:** James Lister  
**Sent:** Thursday, June 18, 2009 4:02 PM  
**To:** Betty Wines  
**Subject:** Email to Albert Lewis  
**Attachments:** hc filing re level 3 dec ruling petition (00012450).PDF

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**From:** James Lister  
**Sent:** Wednesday, June 17, 2009 4:15 PM  
**To:** 'albert.lewis@fcc.gov'  
**Subject:** Hypercube Court Filing

Please see attached

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

HYPERCUBE, LLC and HYPERCUBE  
TELECOM, LLC, §  
§  
§

Plaintiffs, §  
§

vs. §

CASE NO. 3:08-CV-2298-B

COMTEL TELCOM ASSETS LP D/B/A §  
EXCEL COMMUNICATIONS, §  
§

Defendant. §  
§

**HYPERCUBE'S RESPONSE TO  
EXCEL'S NOTICE OF RELATED CASES**

Plaintiffs, Hypercube, LLC and Hypercube Telecom, LLC, by and through its attorneys, hereby provides this response to Defendant's Notice of Related Cases filed with the Court on June 10, 2009. Hypercube responds only to (1) clarify the record with regard to a misstatement of fact by Excel, and (2) make clear that the FCC rulemaking proceeding and the state utility commission proceedings highlighted by Excel have no bearing on the issues before this Court or this Court's ability to adjudicate this matter.

As an initial matter, Excel improperly asserts that "Level 3 Communications, LLC ("Level 3") *filed its Petition* for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls with the FCC, *in WC Dockets 01-92 and 96-262.*" Notice of Related Cases, p. 1 (emphasis added). In fact, Level 3 did not seek to file its Petition in WC Dockets 01-92 and 96-262, as alleged by Excel, but rather attempted unsuccessfully to initiate an entirely separate declaratory ruling proceeding. Indeed, Level 3's Petition directly states that it was filed "[p]ursuant to Section 1.2 of the Commission's rules," 47

C.F.R. § 1.2, which permits the FCC to issue declaratory rulings; such rulings are not made pursuant to the FCC's rulemaking power. However, the FCC declined Level 3's request to initiate a declaratory ruling proceeding, and moreover, the FCC has not even issued a Public Notice seeking comment on Level 3's filing. Instead, the FCC merely placed Level 3's filing among the thousands of comments in the FCC's pre-existing 96-262 and 01-92 dockets relating to all aspects of intercarrier compensation.

Indeed, the rulemaking proceedings in which Level 3's papers have been filed have been ongoing for many years, as evidenced by the "96" and "01" docket prefixes. Level 3's filing is now nothing more and nothing less than one of the 3,416 comments filed in the 01-92 docket and one of the 3,502 comments filed in the 96-262 docket. Eventually, the FCC may decide to take some action in these rulemaking proceedings, but no immediate action is anticipated. Excel's attempt to imply otherwise is unsupported and unfounded.

Therefore, the fact remains that the pending action to which Excel draws the Court's attention is but a rule-making proceeding, not an active case for declaratory judgment. Even if the FCC were to eventually reach some conclusion regarding the ability of an interexchange carrier, like Excel, to flout its obligations to pay tariffed interstate access rates to competitive local exchange carriers, like Hypercube, such a determination would be purely prospective in nature and have no impact on the action currently pending before this court.

In rejecting a claim that changes to FCC regulations modified a contract between private parties, the Seventh Circuit stated in *Jahn v. 1-800-FLOWERS.com, Inc.*, 284 F.3d 807 (7<sup>th</sup> Cir. 2002), "[f]ederal regulations do not, indeed, cannot apply retroactively unless Congress has authorized that step explicitly. No statute authorizes the [FCC] to adopt regulations with retroactive effect. . . ." *Id.* at 810 (citing *Bowen v. Georgetown University Hospital*, 488 U.S.

204 (1988)); *see also Virgin Islands Tele. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) (“A carrier charging rates under a lawful tariff, however, is immunized from refund liability, even if that tariff is found unlawful in a later complaint or rate prescription proceeding. Refunds from lawful tariffs are ‘impermissible as a form of retroactive rulemaking.’ Remedies against carriers charging lawful rates later found unreasonable must be prospective only.” (*quoting ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002))).

Similarly, while Hypercube certainly does not object to the Court’s review of the filings, should it so desire, Excel’s reference to proceedings pending before various state public utility commissions does not in any way impact the outcome of the pending litigation. Hypercube appropriately filed its state proceeding against Level 3 before California’s Public Utilities Commission to put an end to Level 3’s wrongful failure to pay substantial sums related to intrastate services, and presumably it was this action that prompted Level 3’s subsequent FCC petition for declaratory ruling. And the proceedings that DeltaCom, Inc. has filed in certain state commissions – long after Level 3 filed its self-styled “petition” – further demonstrate that Level 3’s FCC filing has no bearing on Hypercube’s ability to enforce its tariffs. Thus, while topically related, the matters that Excel has brought to the Court’s attention should, respectfully, not distract it from the independent merits of this action.

Dated: June 17, 2009

Respectfully submitted,

/s/ Steven H. Thomas

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***Counsel for Plaintiffs Hypercube, LLC and  
Hypercube Telecom, LLC***



**CERTIFICATE OF SERVICE**

I, Steven H. Thomas, hereby certify that on June 17, 2009, a true and correct copy of the foregoing *Hypercube's Response to Excel's Notice of Related Cases* was served via the Court's ECF system to the following counsel of record:

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***Counsel for Defendant/Counterclaim Plaintiff***

/s/ Steven H. Thomas